Sea Oil Mill (1979) Sdn Bhd & Anor v Bank Kerjasama Rakyat Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–298 OF 2003
JAMES FOONG, ZALEHA ZAHARI AND KN SEGARA JJCA
28 AUGUST 2008

Banking — Banks and banking business — Islamic banking — Bai al inah facility — Default in payment — Whether board of directors specifically approved Islamic banking transactions by way of al tarkhis (bai al inah) — Whether transaction ultra vires powers and hence void and unenforceable

Civil Procedure — Summary judgment — Banking — Islamic banking transaction — Bai al inah facility — Disposal of action without trial — Appeal against — Whether simple and obvious case for summary judgment — Whether there were bona fide triable issues — Rules of the High Court 1980 O 14

The first appellant was a private limited company and the second appellant was the director of the first appellant company. Meanwhile, the respondent was a co-operative society registered (or deemed registered) under the Co-operative Societies Act 1993 ('the Act'). The respondent had granted the first appellant an *al tarkhis* ('revolving credit') facility ('facility') under the Islamic banking principle of *bai al inah* in the amount of RM20m. The terms of the facility stated in the respondent's letter of offer dated 3 July 1997 was duly accepted by the first appellant on 9 July 1997. The respondent asserted, that in accordance with the principle of *bai al inah*, the first appellant executed an asset sale agreement ('agreement'), dated 21 August 1997, whereby the respondent sold a property, known as HS(D)986, VIII District of Melaka Tengah Town Area, Melaka to the first appellant, and the first appellant agreed to purchase from the respondent the said asset, at an agreed sale price of RM32.5m subject to the terms and conditions as stipulated in the agreement. Simultaneously, with the execution of the agreement, the first appellant executed the asset purchase agreement, dated 21 August 1997, whereby the first appellant agreed to resell the asset to the respondent, and the respondent agreed to purchase the asset from the first appellant, at an agreed price of RM20m. The purchase price was the facility amount. Besides the agreement and the asset purchase agreement, the first appellant was also required to execute the memorandum of deposit of shares and a power of attorney as security for the facility. Both were duly executed on 21 August

1997. The second appellant, pursuant to a guarantee agreement, dated 21 August 1997, agreed to be the guarantor for the first appellant in respect of the sale price (RM32m) under the agreement. However, the first appellant had defaulted in the payment of the instalments of the sale price. The amount outstanding, as at 30 October 1998 was RM30,983,718.53 (made up of RM19,301,105.64 as the principal amount, being the monies disbursed under the facility, plus the 'profit' of RM11,682,612.89). The judge in chambers had allowed the respondent's O 14 application with costs and entered judgment in the sum of RM30,983,718.53 against the appellants, reversing the decision of the senior assistant registrar. Hence this appeal by the first and second appellants.

Held, allowing the appeal with costs here and below:

(1) This was not a simple and obvious case for summary judgment under O 14. There were serious issues of fact and law to be determined (see para 11).

(2) There was a serious issue as to whether at the date the facility was granted to the first appellant in August 1997, the respondent could lawfully grant the facility under Islamic banking principles when the respondent was a co-operative society registered or deemed registered under the Co-operatives Societies Act 1993. This was a question of fact and law that could only be decided after witnesses have given evidence on behalf of the respondent as to its capacity in law to carry on Islamic banking business, in August 1997 (see para 11).

(3) Even if the approval of the Minister of Land and Co-operative Development was accepted, a factual issue needed to be determined at the trial as to whether the approval was intended to be effective retrospectively. Thereafter, the question would arise as to whether such retrospective authorisation would be lawful, in the face of statutory provisions governing the respondent as to when it could embark on Islamic banking business. It also needed to be determined whether the board of directors, at the meeting on 29 April 1993, specifically approved the Islamic banking transactions by way of *al tarkhis* (*bai al inah*). What exactly was approved by the board was a matter of evidence to be adduced at the trial (see para 18).

[Bahasa Malaysia summary

Perayu pertama adalah sebuah syarikat sendirian berhad dan perayu kedua merupakan pengarah dalam syarikat perayu pertama. Sementara itu, responden merupakan pertubuhan koperasi yang didaftarkan (atau dianggap berdaftar) di bawah Akta Pertubuhan Koperasi 1993 ('Akta'). Responden

telah memberikan perayu pertama satu kemudahan ('kemudahan') *al tarkhis* ('kredit pusingan') di bawah prinsip perbankan Islam *bai al inah* berjumlah RM20j. Terma-terma kemudahan dinyatakan dalam surat tawaran responden bertarikh 3 Julai 1997 yang telah diterima oleh perayu pertama pada 9 Julai 1997. Responden mengatakan, bahawa menurut prinsip *bai al inah*, perayu pertama melaksanakan perjanjian penjualan aset ('perjanjian') bertarikh 21 Ogos 1997, yang dengannya responden telah menjual sebuah hartanah, yang dikenali sebagai HS(D)986, VIII Daerah Kawasan Bandar Melaka Tengah, Melaka kepada perayu pertama, dan perayu pertama bersetuju membeli daripada responden aset tersebut, pada harga jualan yang dipersetujui iaitu RM3.2j tertakluk kepada terma-terma dan syarat-syarat sebagaimana dinyatakan dalam perjanjian. Serentak dengan itu, dengan perlaksanaan perjanjian, perayu pertama melaksanakan perjanjian penjualan aset, bertarikh 21 Ogos 1997, yang dengannya perayu pertama bersetuju menjual semula aset kepada responden, dan responden bersetuju membeli aset daripada perayu pertama, pada harga dipersetujui iaitu RM20j. Harga belian adalah jumlah kemudahan. Selain daripada perjanjian dan perjanjian penjualan aset, perayu pertama juga dikehendaki melaksanakan memorandum pendepositan saham-saham dan surat kuasa wakil sebagai cagaran untuk kemudahan. Kedua-duanya telah dilaksanakan pada 21 Ogos 1997. Perayu kedua, menurut perjanjian jaminan, bertarikh 21 Ogos 1997, bersetuju menjadi penjamin kepada perayu pertama berkenaan dengan harga belian (RM32j) di bawah perjanjian. Walau bagaimanapun, perayu pertama telah gagal membuat pembayaran ansuran kepada harga belian. Jumlah tertunggak, setakat 30 Oktober 1998 adalah RM30,983,718.53 (dikira daripada RM19,301,105.64 sebagai jumlah prinsipal, yang merupakan wang yang dikeluarkan di bawah kemudahan, ditambah dengan 'keuntungan' berjumlah RM11,682,612.89). Hakim dalam kamar membenarkan permohonan A 14 responden dengan kos dan memasukkan penghakiman berjumlah RM30,983,718.53 terhadap perayu-perayu, mengakaskan keputusan penolong kanan pendaftar. Maka rayuan ini oleh perayu pertama dan kedua.

Diputuskan, membenarkan rayuan dengan kos di sini dan di Mahkamah Tinggi:

(1) Ini bukanlah kes penghakiman terus yang mudah dan jelas di bawah A 14. Terdapat isu-isu fakta dan undang-undang serius yang perlu diputuskan (lihat perenggan 11).

(2) Terdapat isu serius terhadap sama ada semasa tarikh kemudahan diberikan kepada perayu pertama dalam bulan Ogos 1997, responden boleh memberikan kemudahan di bawah prinsip-prinsip perbankan Islam apabila responden sebuah pertubuhan koperasi didaftarkan atau

dianggap telah didaftarkan di bawah Akta Pertubuhan Koperasi 1993. Ini merupakan persoalan fakta dan undang-undang yang hanya boleh ditentukan selepas saksi-saksi memberikan keterangan bagi pihak responden berkenaan keupayaannya dari sudut undang-undang bagi menjalankan perniagaan perbankan Islam, pada Ogos 1997 (lihat perenggan 11).

(3) Walaupun kelulusan Kementerian Kemajuan Tanah dan Koperasi diterima, isu fakta perlu diputuskan semasa perbicaraan terhadap sama ada kelulusan diniatkan bertindak sebagai kuat kuasa kebelakangan. Selanjutnya, persoalan akan timbul sama ada kelulusan kebelakangan adalah sah, mengikut peruntukan statut yang menentukan responden berkaitan bila mereka perlu memulakan perniagaan perbankan Islam. Ia juga perlu diputuskan sama ada lembaga-lembaga pengarah, semasa mesyuarat pada 29 April 1993, secara khususnya meluluskan transaksi-transaksi perbankan Islam melalui *al tarkhis* (*bai al inah*). Apa sebenarnya yang diluluskan oleh lembaga pengarah adalah melibatkan perkara keterangan yang akan dikemukakan semasa perbicaraan (lihat perenggan 18).]

Notes

For cases on banking, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7119–7121.

For cases on Islamic banking, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1952–1954.

Cases referred to

Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281, SC (refd)

Legislation referred to

Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 ss 2, 4(2), 14(1), (g)
Companies Act 1965 s 226(3)
Co-operative Societies Act 1993
Development Financial Institutions Act 2002 ss 2(1), 3, 129, 129(1)
Development Financial Institutions (Prescribed Institutions) Order 2002
Rules of the High Court 1980 O 14

Appeal from: Civil Suit No 03–22–4555 of 1988, (Kuala Lumpur, High Court)

Isa Aziz Ibrahim (AI Nathan & Isa Aziz Ibrahim) for the appellants.
Khairuddin Abd Ghani (Amir Ruhana & Khairuddin) for the respondent.

KN Segara JCA (delivering jugdment of the court):

[1] The first and second appellants herein appeal against the decision of the judge in chambers dated 12 March 2003, reversing the decision of the senior assistant registrar. The judge allowed the respondent's O 14 application with costs and entered judgment in the sum of RM30,983,718.53 against the appellants.

[2] The first appellant (first defendant) is a private limited company and the second appellant (second defendant) is a director of the first defendant company. The respondent (plaintiff) is a co-operative society registered (or deemed registered) under the Co-operative Societies Act 1993.

[3] The first defendant is in liquidation since 5 October 2005 and was not represented in this appeal. We were informed by counsel that the *pegawai insolvensi* was aware of the hearing but nevertheless was not present in court on behalf of the first defendant. We were also informed by counsel that no leave of court had been obtained by the first defendant, in compliance with s 226(3) of the Companies Act 1965, to proceed with this appeal. In the circumstances, at the very outset, we ordered that the first defendant's appeal be struck off, with costs to be taxed and the deposit paid to respondent towards account of taxed costs. We then proceeded to hear the second defendant's appeal on its merits.

[4] Briefly, pursuant to the first defendant's request, the plaintiff agreed to grant to the first defendant an *al tarkhis* (revolving credit) facility under the Islamic banking principle of *bai al inah* in the amount of RM20,000,000 ('facility'). The terms of the facility stated in the plaintiff's letter of offer dated 3 July 1997 was duly accepted by the first defendant on 9 July 1997.

[5] The plaintiff asserted, that in accordance with the principle of *bai al inah*, the mechanism used in providing the facility was that the first defendant executed an asset sale agreement, dated 21 August 1997, whereby the plaintiff sold a property, known as HS(D)986, VIII District of Melaka Tengah Town Area, Melaka ('the asset'), to the first defendant, and the first defendant agreed to purchase from the plaintiff the asset, at an agreed sale price of RM32,500,000, subject to the terms and conditions as stipulated in the asset sale agreement. Simultaneously with the execution of the asset sale agreement, the first defendant executed the asset purchase agreement, dated 21 August 1997, whereby the first defendant agreed to resell the asset to the plaintiff, and the plaintiff agreed to purchase the asset from the first defendant, at an agreed price of RM20,000,000 ('purchase price'). The purchase price is the facility amount.

[6] Besides the asset sale agreement and the asset purchase agreement, the first defendant was also required to execute the memorandum of deposit of shares and a power of attorney as security for the facility. Both were duly executed on 21 August 1997.

[7] The second defendant, pursuant to a guarantee agreement, dated 21 August 1997, agreed to be the guarantor for the first defendant in respect of the sale price (RM32,000,000) under the asset sale agreement.

[8] The first defendant had committed an event of default by defaulting in the payment of the installments of the sale price as agreed under cl 8.1(a) and second schedule of the asset sale agreement. The amount outstanding, as at 30 October 1998 was RM30,983,718.53 (made up of RM19,301,105.64 as the principal amount, being the monies disbursed under the facility, plus the 'profit' of RM11,682,612.89).

[9] On 10 December 1998 the plaintiff filed a writ and statement of claim which was subsequently amended on 5 April 1999, claiming the sum of RM30,983,718.53. On 4 February 1999 the plaintiff filed an O 14 application for summary judgment.

[10] We allowed the second defendant's appeal with costs here and below. The order of the High Court dated 12 March 2003 against the second defendant is set aside. The second defendant is to file his defence within 14 days hereof.

[11] We are of the view, upon a careful perusal of all the affidavits filed by the plaintiff and the second defendant, that there are issues of both, fact and law, which warrant the case to go for trial. This is not a simple and obvious case for summary judgment under O 14 of the Rules of the High Court 1980. There is a serious issue as to whether at the date the facility was granted to the first defendant in August 1997, the plaintiff could lawfully grant the facility under *Islamic banking* principles when the plaintiff was a *co-operative society* registered or deemed registered under the Co-operatives Societies Act 1993. This is a question of fact and law that can only be decided after witnesses have given evidence on behalf of the plaintiff as to its capacity in law to carry on Islamic banking business, in *August 1997*. These witnesses would probably include (i) the chairman of the board of directors of the plaintiff who attended the meeting of the board of directors on 29 April 1993 where 'Operasi Bank Mengikut Konsep Syariah' was discussed, and (ii) the Minister of Land and Co-operative Development who wrote the letter dated *4 December 2001* (more than *eight years* after the said board meeting) wherein he stated:

A 2 Dengan ini dimaklumkan bahawa saya:

2.1 membenarkan Bank Rakyat melaksanakan operasinya mengikut prinsip Syariah seperti yang diluluskan oleh Lembaga Pengarah Bank Rakyat pada 29 April 1993; dan

B 2.2 …

[12] Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 ('Act 202') is an Act to make special provisions for the proper C management and administration of the plaintiff. Under s 2 of Act 202:

'Bank' means the co-operative society known as the Bank Kerjasama Rakyat Malaysia Berhad

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[13] Under s 4(2) of Act 202, the board of directors of the bank shall be responsible for carrying out the function and powers, and the general administration of the affairs and business of the bank. Section 14(1) of E Act 202, sets out the authorised business of the bank. Section 14(1) of Act 202 reads:

14(1) In addition to the powers, functions, duties, and responsibilities conferred or imposed on the Bank by the Ordinance, the rules made thereunder, and the F bye-laws of the Bank, the Bank may —

(a) make loans to, and stand guarantee for any loan of money to, any person, whether or not a member of the Bank;

(b) grant and issue letters of credit to any person, whether or not a G member of the Bank;

(c) acquire, hold issue on commission, underwrite, and deal with stock, bonds, funds, obligations, securities, and investments of all kinds;

H (d) transact all manner of agency business;

(e) acquire and undertake the whole or any part of the business of any person or company carrying on any business of the same nature as the Bank may lawfully carry on, or possessed of property suitable for the purposes of the Bank;

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(f) maintain accounts with other banks in Malaysia;

(g) carry on *other business expressly authorised* by the Minister with the *concurrence of the Minister of Finance.*

[14] Islamic banking business would probably fall under s 14(1)(g) above. The issues would then be:

(i) Had the Minister of Land and Co-operative Development obtained the concurrence of the Minister of Finance when he wrote the letter dated 4 December 2001, as the letter does not so state; and

(ii) is an authorisation that is only expressed on 4 December 2001 sufficient to legitimise a transaction of the plaintiff executed in August 1997? Does it render the Islamic banking transaction with the defendants ultra vires the powers of the plaintiff and hence void and unenforceable?

[15] In *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281, at p 288 the Supreme Court had occasion to observe:

> Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is ex facie illegal.

[16] The Development Financial Institutions Act 2002 ('Act 618') came into operation on 15 February 2002 (PU(B) 51/2002). This Act shall apply to such financial institutions as may be prescribed by the Minister by order published in the gazette (see s 2(1) of Act 618). Under the Development Financial Institutions (Prescribed Institutions) Order 2002, dated 15 February 2002 published in the gazette (PU(A) 68/2002), the plaintiff was, inter alia, one of the financial institutions listed in the schedule of the order. The plaintiff is thus also governed by Act 618 with effect from 15 February 2002, as a prescribed institution.

[17] Under s 3 of Act 618 'bank' means Central Bank of Malaysia. Section 129(1) of Act 618 clearly prohibits a prescribed institution from carrying on any Islamic banking business or Islamic financial business *before obtaining the prior written approval of the Central Bank of Malaysia.* For ease of reference s 129 of Act 618 is reproduced:

> Section 129
>
> (1) Nothing in this Act or the Islamic Banking Act 1983 [Act 276] shall prohibit or restrict any prescribed institution from carrying on Islamic banking business or Islamic financial business in addition to its existing business, *provided that* the prescribed institution *shall obtain the prior written approval of the Bank before it carries on* Islamic banking business or any Islamic financial business.

(2) For the avoidance of doubt, it is declared that a prescribed institution shall, in respect of the Islamic banking business or Islamic financial business carried on by it, be subject to the provisions of this Act.

(3) The Bank may, in consultation with the Syariah Advisory Council established under the Banking and Financial Institutions Act 1989, issue directions to a prescribed institution on matters relating to Islamic banking business or any other Islamic financial business and the prescribed institution shall comply with the written directions.

(4) The prescribed institution may, in carrying on Islamic banking business or Islamic financial business, seek the advice of the Syariah Advisory Council on the operations of such business in order to ensure that it does not involve any element which is not approved by the religion of Islam.

(5) For the purposes of this section —

(a) 'Islamic banking business' has the same meaning assigned to it by the Islamic Banking Act 1983; and

(b) 'Islamic financial business' means any Islamic financial business, the aims and operations of which do not involve any element which is not approved by the religion of Islam.

[18] It is patent from the above that there are serious issues to be tried. Even if the approval of the Minister of Land and Co-operative Development is accepted, a factual issue needs to be determined at a trial as to whether the approval was intended to be effective retrospectively. Thereafter, the question will arise as to whether such retrospective authorisation would be lawful, in the face of statutory provisions governing the plaintiff as to when it can embark on Islamic banking business. There also needs to be determined whether the board of directors, at the meeting on 29 April 1993, specifically approved Islamic banking transactions by way of *al tarkhis* (*bai al inah*). The minutes of the meeting produced seem to suggest the transactions approved were:

(i) Bai Bithaman Ajil ('BBA');

(ii) Al Musyarahkah;

(iii) Al Mudharrabah; and

(iv) Al Ijarah.

[19] What exactly was approved by the board is a matter of evidence to be adduced at the trial. We are unanimous that this is not a plain and obvious case that can be disposed of in a summary manner. There are serious issues

of fact and law to be determined. The appeal of the second defendant is allowed, with the consequential orders and directions already stated earlier in this judgment.

Appeal allowed.

Reported by Ashgar Ali Ali Mohamed